BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRON L. MEYER Claimant VS. **FRONTIER AG, INC.** Respondent AND **FARMLAND MUTUAL INSURANCE CO.** Insurance Carrier	)	Docket No. **1,052,768**

ORDER

Respondent and its insurance carrier request review of the November 23, 2010 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The claimant, while waiting for a scale ticket in the office of a grain elevator, noticed one of his shoes had become untied. He placed his foot on a chair and tied his shoe. As he removed his foot from the chair the heel of his shoe got caught in a tear in the chair upholstery causing him to lose his balance and fall. Claimant's right knee hit the concrete floor and was injured.

Respondent argued that the injury did not arise out of the course of employment and instead was the result of an activity of day-to-day living and a personal risk. Claimant argued the injury was compensable because it was caused by a risk particular to his employment or, in the alternative, a neutral risk.

The Administrative Law Judge (ALJ) determined that the torn upholstery in the chair constituted a hazard of employment which concurred with the personal risk of tying the shoe. Consequently, the ALJ determined claimant had met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment with respondent.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment with respondent. Respondent argues the claimant's

accidental injury was the result of a normal every day activity and a personal risk not directly traceable to his employment.

Claimant argues he met his burden of proof to establish that his injury was the result of either a risk particular to his employment or, in the alternative, a neutral risk during his work duties with respondent. Claimant requests the Board affirm the ALJ's Order.

The sole issue raised on this appeal from a preliminary hearing order is whether claimant met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant is employed as a truck driver for respondent. He hauls grain from respondent's grain elevators. On June 3, 2010, claimant was hauling approximately four loads of milo daily from Bogue, Kansas, to Phillipsburg, Kansas. At the time of his injury, claimant was getting a scale ticket from the clerk in the office of respondent's grain elevator in Bogue, Kansas. He needed the ticket and paperwork in order to deliver the load. Claimant described the accident:

> I come in the front door and I noticed my right shoelace was untied, and she was printing the ticket, it doesn't take very long, and there's usually several other trucks in line, so you have to move fairly quickly. And she was printing the ticket at that time, I just walked over to the nearest chair, put my right foot up to tie it, and tied it, and as I was putting it back down on the floor my heel caught in the foam, or the tear of the chair, and I went down with it as I was putting my foot down.[1]

Claimant lost his balance and fell to the concrete floor on his right knee. Two individuals witnessed the accident. Claimant continued working and then he noticed he had swelling in his right knee and wasn't able to walk. So the next morning he called his boss, Tom Vey, and advised him about the knee and the accident.

Tad Bloom, respondent's human resource person, had a discussion with claimant about how the accident happened. Mr. Bloom advised claimant to seek medical treatment with the local physician, Dr. Padala Reddy, in Hill City. The doctor ordered x-rays and an MRI. He then referred claimant to a specialist, Dr. Alex De Carvalho, in Hays, Kansas. Due to increasing swelling in claimant's leg, the doctor ordered a Doppler study which was performed at Hays Medical Center in Hays, Kansas. Claimant was diagnosed with a

[1] P.H. Trans. at 13.

severe sprain in his right knee. On October 26, 2010, claimant was released from Dr. De Carvalho's care at maximum medical improvement. Claimant testified that he did not have any problems with his knees before the accident.

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

In this instance, there is no dispute that claimant was in the course of his employment when the accident occurred as claimant was at work in the respondent's service. The dispositive issue is whether claimant's accidental injury arose "out of" his employment with respondent.

---

[2] K.S.A. 2009 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[4] *Id.* at 278.

Under the Kansas Workers Compensation Act an injury does not "arise out of" employment where the disability is the result of the natural aging process or by the normal activities of day-to-day living.[5] An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[6] But an injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.[7]

In *Hensley*,[8] the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. "Only those risks falling in the first category are universally compensable; personal risks do not arise out of the employment and are not compensable."[9] In Kansas, unexplained falls are compensable.[10] But in this instance the fall was explained. Claimant's foot caught in the upholstery of the chair which caused him to lose his balance and fall. And such a fall would more appropriately fit the category of a risk personal to the worker. But the fall was caused by claimant's foot getting caught in the chair upholstery which is a unique hazard of employment in this instance.

The ALJ analyzed the facts and law in the following pertinent part:

> Here, while the risk of falling while tying his shoe would ordinarily have been a risk personal to Claimant, the risk was compounded by the conditions of the premises, specifically the torn upholstery that caught his heel and caused him to lose his balance. Where there is a concurrence between a personal risk or condition and a hazard of employment, compensation is generally allowed. **Bennett v. Wichita Fence Co.**, 16 Kan. App. 2d 458, 824 P.2d 1001 (1992).
>
> From the evidence presented, Claimant's fall was caused or contributed to by the torn upholstery in which he caught the heel of his shoe. "But for" that tear, there is no indication Claimant would have fallen or suffered injury. Claimant has

---

[5] K.S.A. 44-508(e).

[6] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006)

[7] *Anderson v. Scarlett Auto Interiors,* 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

[8] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979); see also *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d. 5, 61 P.3d 81 (2002).

[9] *Martin v. U.S.D. 233*, 5 Kan. App. 2d 298, 299, 615 P.2d 168 (1980).

[10] *McCready v. Payless Shoesource*, 41 Kan. App.2d 79, 200 P.3d 479 (2009).

sustained his burden of proof that his accidental injury arose out of and in the course of his employment with Respondent.[11]

This Board Member agrees and affirms.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[13]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated November 23, 2010, is affirmed.

IT IS SO ORDERED.

Dated this 28th day of January, 2011.

_____
HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Jeffrey E. King, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[11] ALJ Order (Nov. 23, 2010) at 2.

[12] K.S.A. 44-534a.

[13] K.S.A. 2009 Supp. 44-555c(k).